No. 88-266

In The

Supreme Court of the United States

October Term, 1988

Oklahoma Tax Commission,

Petitioner,

v.

Jan Graham, *et al*,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF AMICUS CURIAE, IN SUPPORT OF RESPONDENT, OF THE INTER-TRIBAL COUNCIL OF THE FIVE CIVILIZED TRIBES

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This brief *amicus curiae* is filed, in support of Respondent, by the Inter-Tribal Council of the Five Civilized Tribes, with the consent of both parties.

INTEREST OF AMICUS CURIAE

The instant case raises central questions concerning removal of suits by states, seeking to advance their sovereignty *vis-a-vis* that of federally-recognized Indian tribes, in state court. This question, in turn, raises related issues concerning the potency of the federal interest (pursuant to the federal trust responsibility) both in tribal sovereign immunity, and in state civil jurisdiction relating to Indian activities within Indian country. Moreover, Petitioner Tax

Commission has advanced a broad, wide-ranging theory that tribal sovereignty has been extinguished in Oklahoma, that consequently, no Indian country is left therein, and that state law, presumably part and parcel, applies to all Indian people, tribes, and lands in Oklahoma. Ancillary to this approach, the Tax Commission asserts that Congress lacks constitutional authority to shield Indian tribes from noncriminal state jurisdiction insofar as this Court has placed that interpretation on 18 U.S.C. § 1151.

The Inter-Tribal Council of the Five Civilized Tribes was organized on February 3, 1950, and is comprised of the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Seminole Nation, and the Muscogee (Creek) Nation, which were long ago removed to Oklahoma under circumstances which are now well known. *See, e.g., Choctaw Nation v. Oklahoma*, 397 U.S. 620, 622-26 (1970). The Inter-Tribal Council, in representing these Indian Nations, represents tribes which are not only the largest in Oklahoma, but among the largest in the United States. As such, and as the representative of tribes whose sovereignty and integrity have been retained after long and arduous historical struggle, the Inter-Tribal Council resists the Tax Commission's characterization of its tribal components' sovereignty as "extinguished," their reservations as "disestablished," their citizens as "assimilated," their former governments as "non-American [and] radically wrong,"[1] and their current governments as "dethroned." *See* Brief of Petitioner at 13, 16, 32. The Inter-Tribal Council is also appalled at the Tax Commission's apparently approving and uncritical citation of a

[1] In this context, the Inter-Tribal Council calls this Court's attention to *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988), *petition for cert. filed*, 1988 WL 72544 (U.S. Nov. 12, 1988) (No. 87-5377). In that case, the court noted that "[t]hese tribes are known collectively as the Five Civilized Tribes because of their adaptability in developing institutions comparable in many respects to the European models. *Id.* at 1441 n.2 (citing V. Deloria Jr., and C. Lytle, *American Indians, American Justice* 86-87 (1983).

Dawes Commission report concluding that "a higher law than that of Congress destined [the Indians] to extinction as a race . . . ," Brief of Petitioner at 19, and believes that it has something to contribute regarding the Tax Commission's characterization of the Dawes Commission's activities as "statesmanship." *See Id.* at 38. Since the members of the Inter-Tribal Council will be affected not only by the substantive and procedural outcome of the instant case, but also by the broader ramifications of the Tax Commission's far-reaching and novel theories of law, it participates in support of the decision of the court of appeals in this case.

SUMMARY OF ARGUMENT

In his first dissent in this Court, Justice Holmes stated a proposition which may be applied, in part, with equal force to the instant case:

> Great cases like hard cases make bad law. For great cases are called great . . . because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what was previously clear seem doubtful, and before which even well settled principles of law will bend.

Northern Securities Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

In the instant case, *amicus* believes that both the overwhelming and dominant nature of the federal interest in the field of Indian law generally, and, more specifically, the overwhelming dominance of the federal interest in the fields of tribal sovereign immunity and state civil jurisdiction over Indian activities in Indian country are, indeed, "well settled." Nevertheless, the Oklahoma Tax Commission *presents* this case as a "hard" one, asserting that, should it not prevail herein, it will be "barred from seeking a remedy" to enforce any rights which it may have, Petition for Certiorari at 8, and, moreover, that an adverse ruling from this Court "would impair the State's ability to function effectively in a federal system." Brief

of Petitioner at 31. *Amicus*, of course, does not suggest that Indian law cases as a group, involving their complex interplay of treaties, federal statutes, and federal common law are among the "easiest." Nor is it unaware that this case, involving the application, *inter alia*, of the "complete preemption" doctrine of *Avco Corp. v. Aero Lodge*, 390 U.S. 557 (1968), and *Metropolitan Life Ins. Co. v. Taylor*, ___ U.S. ___, 107 S. Ct. 1542 (1987), and the "artful pleading" exception to the "well pleaded complaint" rule, *see, e.g., Federated Dep't Stores v. Moitie*, 452 U.S. 394, 397 n.2 (1981), to a state's attempt to impose its sovereignty over that of a federally-recognized tribe in an unconsented state court suit is, in its removal-jurisdiction aspects, one of first impression. *But see Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) ("mirror image" of the instant case, in which a *tribe* successfully brought what might otherwise have been characterized as a common-law ejectment action in federal court).

In reality, however, this case, at least from the standpoint of Oklahoma's economic (and other) survival, is not as "hard" as the Tax Commission suggests. Contrary to its assertions, it is not without a remedy to enforce any rights which it may have. In *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 161-62 (1980), this Court recognized and validated state power – actually employed in that case – to seize unstamped cigarettes outside of Indian country, which were destined for delivery and sale therein. This power, not an empty one, led in direct and proximate fashion to the ultimate settlement achieved by California in the aftermath of the *Chemehuevi* cigarette sales tax litigation, whose final judicial chapter was written in *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 800 F.2d 1446 (9th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 2184 (1987).[2]

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[2] In earlier stages of the *Chemehuevi* litigation, the tribe successfully asserted its sovereign immunity when confronted

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Regarding that portion of the Tax Commission's complaint seeking to assert its jurisdiction to tax the tribal bingo operation, J.A. 3, a different (but even less economically threatening) pattern emerges. This Court has held that tribal bingo operations stand on a legally distinct footing from tribal cigarette sales. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219-20 (1987). The distinction which this Court drew in *Cabazon Band* for regulatory jurisdiction purposes has been logically extended into the taxing jurisdiction context as well. *See, e.g., Indian Country, U.S.A. v. Oklahoma Tax Comm'n*, 829 F.2d 967, 982 (10th Cir. 1987), *cert. denied sub nom. Oklahoma Tax Comm'n v. Muscogee (Creek) Nation*, ___ U.S. ___, 108 S. Ct. 2870 (1988). In any event, attempts by the Tax Commission to impose gross receipts taxes upon tribal bingo operations have now been mooted by the Indian Gaming Regulatory Act, § 11(d)(4), ___ Stat. ___, 134 Cong. Rec. S12,657 (daily ed. Sept. 15, 1988).

The Tax Commission also seeks to tax the gross receipts from the Chickasaw Motor Inn and Restaurant. J.A. 4. The *per se* rule against state taxation of Indian tribes and tribal members regarding activities within Indian country is well known; accordingly, this Court has

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with an attempt by California to counterclaim for back taxes in an action for injunctive relief brought by the tribe. *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047, 1052 & n.6 (9th Cir. 1985). The state sought certiorari regarding four questions, the last of which concerned the sovereign immunity ruling. *See* Petition for Certiorari, *id.* (U.S. July 22, 1985) (No. 85-130), "Questions Presented." This Court granted certiorari *only* on the first three questions presented. *California State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 12 (1985), and reversed, in part, on other grounds. *Id.* Despite the continued vitality of the Ninth Circuit's sovereign immunity ruling, when confronted with the state's *Colville*-approved power to engage in seizures outside of Indian country, the tribe succumbed, and agreed, in a settlement, to collect the tax.

held that "it is unnecessary to rebalance those interests in every case." *Cabazon Band*, 480 U.S. 202, 215 n.17.[3]

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[3] *Amicus* is aware, of course, of *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), in which this Court permitted New Mexico to impose a gross receipts tax on a tribally-operated ski resort located on land leased from the federal government for that purpose. *Jones*, however, is distinguishable from the instant case in numerous respects.

First, tribal sovereign immunity was not raised in that case.

Second, as the *Jones* Court itself noted, in certain areas of Indian law, generalizations have given way to individualized treatment of treaties and federal statutes, including statehood enabling legislation. *Jones*, 411 U.S. at 148. In New Mexico's Enabling Act, 36 Stat. 557, 559 (1910), Congress, *expressly speaking in reservation terms*, disclaimed any intent to preclude state taxation of *off-reservation* lands or property. Consequently, this Court concluded that "[i]t is thus clear that in terms of general power New Mexico retained the right to tax, unless Congress forbade it, all Indian land and Indian activities located or occurring 'outside of an Indian reservation.' " *Jones*, 411 U.S. at 149-50. Oklahoma's Enabling Act, 34 Stat. 267 (1906), is markedly unlike that of New Mexico. Aware of the quantity and breadth of Oklahoma Indian treaty guarantees providing, for example, that tribes would never be brought within the boundaries of any state, *see, e.g.*, F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) 771 & n.8, Congress, in the first paragraph of a lengthy statute, inserted a broad proviso "[t]hat nothing contained in said constitution shall be construed to limit or impair rights of *person or* property *pertaining to* the Indians of said Territories . . . ." 34 Stat. 267 (1906). Moreover, Oklahoma's general "disclaimer" proviso, unlike New Mexico's, neither speaks in "reservation" terms, nor disclaimed Congressional intent to preclude state taxation of Indian interests of any kind. 34 Stat. 267, 270. Two consequences flow from the above analysis: first, Oklahoma stands in a *less* favorable posture than New Mexico regarding taxation of Indian interests; second, any of this Court's analysis in *Jones* going beyond

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Thus, the Tax Commission's plaintive declarations concerning both the absence of any remedy available to

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its conclusion that the leased national forest land at issue there (which was, *unlike* the trust land at issue in the instant case, outside original reservation boundaries) was not a "reservation" *as defined by the New Mexico Enabling Act*, was unnecessary to the decision in that case.

Third, this Court's observation in *Jones*, 411 U.S. at 155 n.11, that "it would have been meaningless for the United States, which already had title to the forest, to convey title to itself" in trust for the tribe, is clearly inapposite here. Apart from the obvious fact that the United States may well have wished to retain full, unencumbered ownership of that land, only leasing it to the tribe for a time certain, the *tribe*, not the United States, had prior fee ownership of the land at issue in the instant case. Thus, neither the decision of the tribe to convey the land to the United States in trust, nor the decision of the United States to accept it in trust, were "meaningless" acts in this case.

Fourth, assuming *arguendo* that any statements by this Court in *Jones* were neither *obiter* nor distinguishable, subsequent cases decided by this Court have modified the *Jones* footnote analysis regarding the true modern meaning of "reservation" status. *United States v. John*, 437 U.S. 634, 648-49 (1978); *see also United States v. Sohappy*, 770 F.2d 816, 822-23 (9th Cir. 1985), *cert. denied*, 477 U.S. 906 (1986); *State v. Sohappy*, 757 P.2d 509, 511-12 (Wash. 1988) (site may be "reservation" for purposes of state jurisdiction even where outside original reservation boundaries). The observation concerning *Jones* made in the first sentence of this paragraph is equally apposite to the Tax Commission's reliance on *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), a case apparently influenced by terminationist policy, *id.* at 74, *see also infra* at 26, and involving a Public Law 280 state. No reference was made in *Kake* to 18 U.S.C. §1151; in fact, this Court's statement in *Kake* that "state authority over Indians is yet more extensive over activities . . . not on any reservation," on which the Tax Commission relies, *see* Brief of Petitioner at 28, was made, depending on how the original passage is read, see *Kake*, 369 U.S. at 75, either utterly without

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it, and the consequent devastation of Oklahoma's "ability to function effectively in a federal system," should not be given great weight. What is *really* at stake from the Tax Commission's standpoint is its ability to, at most, invoke a judicial remedy *in addition to* the judicially-*sanctioned* self-help remedy of seizure outside of Indian country to collect its cigarette sales tax. *Amicus* urges this Court to refrain, in Justice Holmes' words, from viewing as "unclear" the "settled principles" concerning, *inter alia*, the overwhelming nature of the federal interest (pursuant to the trust responsibility) in preserving tribal sovereign immunity (which Congress has abrogated only selectively and with great care), recognized by this Court with a heretofore unwavering consistency, and the overwhelming nature of the federal interests, also pursuant to the trust responsibility, in *selectively* extending state civil jurisdiction over federally-recognized Indian tribes. *See, e.g.*, Public Law 83-280, 67 Stat. 588 (1953).

Amicus will further urge that both federal common law and federal statutory law may create a case "arising under" the laws of the United States. It will maintain that, in contrast to the Tax Commission's protestations, neither *Gully* nor subsequent caselaw established a one-dimensional standard of removal-jurisdiction review, and that the "legal realities" of a case, as manifest in the "complete preemption" "corollary" to the well-pleaded complaint rule, and the "artful pleading" exception thereto, are not irrelevant to the true characterization of the plaintiff's case for removal purposes. It will defend

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authority, or by reference to a 1940 law review article by Felix Cohen which does not support the proposition at all, *see id.* (referring to "Indian country," not "reservations"), or by reference to this Court's decisions *prior to the adoption of 18 U.S.C. §1151. Id.* It may also be noted that *Kake* was decided thirteen years prior to this Court's decision in *De Coteau v. District Court*, 420 U.S. 425, 446-47 (1975) (unequivocally applying §1151 in a noncriminal context to alloted land).

the proposition that the criteria for applying both exceptions are satisfied in the instant case. *Amicus* will further defend the alternative proposition that in any case, since tribal sovereign immunity is jurisdictional, rendering void any judgment (even where the defendant tribe does not appear) absent valid waiver, it is not properly characterized as a mere federal defense. *See, e.g., Ramey Constr. Co. v. Apache Tribe*, 673 F.2d 315, 318 (10th Cir. 1982). The decision of the court of appeals below, affirming the federal district court's refusal to remand the case to the Oklahoma district court was, therefore, correct.

Equally correct was the court of appeals' affirmance of the federal district court's decision to dismiss. The law in effect at the time at which this case was filed and removed to federal court provided for derivative jurisdiction only upon removal: where the state court lacked jurisdiction over the claim, the federal court acquired none, even where the case could otherwise have been brought in federal court. Here, the state court lacked subject matter jurisdiction (and may well have lacked *in personam* jurisdiction as well), since the state cannot give itself subject matter jurisdiction, and since both federal common law and the selective nature of congressional extensions of state court jurisdiction over Indian tribes and Indian country, reflected, *inter alia*, in the Termination Acts, Public Law 280, and the Indian Civil Rights Act of 1968, clearly evidence preemption of the field. *See, e.g., Kennerly v. District Court*, 400 U.S. 423, 426-27 (1971). The Tax Commission's startling assertions that Indian country does not exist in Oklahoma, and that, if it does, Congress, in pursuance of its trust responsibility, lacks constitutional authority to shield the tribes from noncriminal state jurisdiction (insofar as this Court has placed that interpretation on 18 U.S.C. § 1151) are wholly and utterly without merit.

ARGUMENT

I. THE TENTH CIRCUIT DECISION BELOW CORRECTLY AFFIRMED THE REMOVAL JURISDICTION OF THE FEDERAL DISTRICT COURT.

A. For Purposes of 28 U.S.C. §§ 1331 and 1441(b), "laws of the United States" Includes Federal Common Law as Well as Federal Statutory Law.

That an action which could be deemed to "arise under" federal law if based on federal statutory law will also be deemed to "arise under" federal law if based on federal common law, is now well settled. *See, e.g., Illinois v. City of Milwaukee*, 406 U.S. 91, 99-100 (1972). That this premise extends to Indian law cases is reflected, *inter alia*, by cases such as *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 851-53 (1985). In short, the federal common law/federal statute dichotomy constitutes a distinction without a difference for purposes of 28 U.S.C. §§ 1331 and 1441(b).

B. *Gully*, its Antecedents, and its Progeny, Establish no Ossified, Unidimensional Standard of Removal-jurisdiction Review.

"Although the constitutional meaning of 'arising under' may extend to all cases in which a federal question is 'an ingredient' of the action, *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 823 (1824), [this Court has] long construed the statutory grant of federal question jurisdiction as conferring a more limited power." *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804, 807 (1986). How *much* more limited is the power which federal courts may invoke is, of course, one of the central issues in the instant litigation.

The Tax Commission has – quite competently – identified and cited to every conceivable statement which may be favorable to it by Justice Cardozo, writing for this Court in *Gully v. First National Bank*, 299 U.S. 109 (1936). *See* Petition for Certiorari at 6-8; Brief of Petitioner at 7. In so doing, it essentially attempts to establish seven propositions: *first*, that in order to be a removable federal question, the suit must be, in "nature," *created by* federal law; *second*, that the federal question must be disclosed

on the face of the complaint, and that reference to the removal petition for any purpose is always unwarranted; *third*, that the "source" of the authority to bring the suit is always wholly irrelevant; *fourth*, that regardless of the surrounding legal reality, plaintiff remains master of the claim so long as "no claim within the . . . original pleading . . . is founded upon the Constitution, treaties, or laws of the United States," Brief for Petitioner at 6; *fifth*, that as long as the plaintiff will still have to prove some element(s) of the state cause of action, no federal question jurisdiction obtains, *see* Brief for Petitioner at 7; *sixth*, that the federal dispute herein is "so conjectural, and so far removed from plain necessity, that it is unavailing to extinguish the jurisdiction of the State Court," Petition for Certiorari at 7; *see also Gully*, 299 U.S. at 117; and *seventh*, that a case may not be removed based on "a federal defense, including the defense of [presumably 'ordinary,' *Pilot Life*-style] pre-emption." Brief for Petitioner at 8. *Amicus* believes that only the last of these propositions accurately reflects this Court's current approach to the issue, or, in the case of the sixth proposition, the legal reality of the instant case.

Even prior to *Gully*, this Court recognized that the "master of the forum" doctrine was not absolute; in *Great Northern Ry. v. Alexander*, 246 U.S. 276, 282 (1918), it qualified the doctrine by stating that "in the absence of a fraudulent purpose to defeat removal . . . [4] whether such a case . . . shall . . . become removable depends . . . solely on the form which the plaintiff by his voluntary action shall give to the pleadings."

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[4] *Amicus* should quickly add that neither it nor (in its understanding) Respondent suggests any fraudulent purpose on the part of the Tax Commission; it does submit, however, that the circumstances and nature of the filing of the complaint give rise to a probable inference of proscribed "artful pleading." *See infra* at 11 n.8. The citation adduced above is presented solely for illustration of the historically non-absolute nature of the "well pleaded complaint" rule.

While Justice Cardozo's opinion in *Gully* undoubtedly provides fodder to proponents of an absolutist approach, it also furnishes ample support for the more realistic approach which has taken hold in subsequent caselaw. In the selfsame case, he wrote that

> the *probable course of the trial*, the *real substance of the controversy*, has taken on a new significance. 'A suit to enforce a right which takes its *origin* in the laws of the United States is not necessarily, or for that reason *alone*, one arising under those laws . . . *unless* it *really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends.*' *Shulthis v. McDougal*, 225 U.S. 561, 569.

Gully, 299 U.S. at 113-14 (emphasis added). Recognizing the need to preserve flexibility in federal question analysis, he concluded:

> What is needed is something of that *common sense accommodation of judgment* to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end. Instead, there has been a selective process which picks the *substantial causes* out of the web and lays the other ones aside . . . . To set bounds to the pursuit, the courts have formulated the *distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible.*

Id. at 117-18 (emphasis added) (citations omitted).

The continued and necessary flexibility of approach to the federal question conundrum has been reaffirmed with unwavering consistency in this Court's contemporary caselaw. In 1983, Justice Brennan, writing for a unanimous Court, stated:

> Since the first version of §1331 was enacted . . . the statutory phrase 'arising under the Constitution, laws, or treaties of the United States' has resisted all attempts to frame a single, precise definition for determining all cases which fall within . . . . Especially when considered in light of §1441's removal jurisdiction, the phrase 'arising under' masks a welter of issues regarding the interrelation of state authority and the proper management of the federal judicial system.

Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 8 (1983). In that case, Justice Brennan commented further that Justice Holmes' statement that "[a] suit arises under the law that *creates* the cause of action," *American Well Works v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (emphasis added), has been rejected by even its most ardent proponent as an exclusionary principle, *Franchise Tax Board*, 463 U.S. at 9, and was more appropriately characterized as a "quick rule of thumb." *Id.* at 11; *see also Merrell Dow*, 478 U.S. at 808-09 & n.5 (1986). Recognizing that "[r]emoval is but one aspect of 'the primacy of the federal judiciary in deciding questions of federal law,' " *Avco Corp. v. Aero Lodge*, 390 U.S. 557, 560 (1968), this Court has interpreted §1441(b) "with an eye to practicality and necessity." *Franchise Tax Board*, 463 U.S. at 20. It observed in *Merrell Dow*, 478 U.S. at 810:

> We have constantly emphasized that, in exploring the outer reaches of §1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system. 'If the history of the interpretation of judiciary legislation teaches us anything, it teaches the duty to reject such statutes as a wooden set of self-sufficient words . . . .'

The current – and correct – approach is clearly multidimensional. Rather than adhering to Justice Holmes' rigidly confining approach, recent cases – *interpreting and citing Gully* – have held it to mean that federal question jurisdiction exists "when a federal question is *presented* on the face of the plaintiff's properly pleaded complaint," *Caterpillar, Inc. v. Williams*, ___ U.S. ___, 107 S.Ct. 2425, 2429 (1987) (emphasis added), or "when the plaintiff's properly pleaded complaint *raises* issues of federal law." *Metropolitan Life Ins. v. Taylor*, ___ U.S. ___, 107 S.Ct. 1542, 1546 (1987) (emphasis added). Both *Franchise Tax Board* and *Merrell Dow* expressly reaffirm *Gully's* implication that "[e]ven though state law creates [plaintiff's] causes

of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint established that its *right to relief under the state law requires resolution of a substantial question of federal law in dispute between the parties.*" *Franchise Tax Board*, 463 U.S. at 13 (emphasis added); *see also id.* at 27-28; *Merrell Dow*, 478 U.S. at 806 n.2. Nothing in *Caterpillar* detracts from these conclusions.

Both *Avco* and *Taylor* found the "complete preemption" test to have been met. Interpreting *Avco* in *Franchise Tax Board*, this Court stated that "[t]he necessary ground for decision was that the pre-emptive force of § 301 [of the LMRA] is *so powerful* as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' " *Id.* at 23.[5]

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[5] In a critical footnote placed immediately at the end of the above-adduced quotation, this Court cited *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) – and Justice Rehnquist's concurring opinion therein – *id.* at 682, with approval:

> *To a similar effect* is *Oneida Indian Nation v. County of Oneida* . . . in which we held that – unlike all other ejectment suits in which plaintiff derives its claim from a federal grant . . . – an ejectment suit based on Indian title is within the . . . 'federal question' jurisdiction . . . because Indian title creates a federal possessory right to tribal lands 'wholly apart from the application of [normal] state law principles . . . .' *Cf.* 414 U.S., at 682-683 (Rehnquist, J., concurring).

Franchise Tax Board, 463 U.S. at 23 n.25. Justice Rehnquist's further observations in *Oneida* are also noteworthy here:

> The majority finds this strict rule [which would otherwise charaterize a tribal ejectment action as a state common law one] inapplicable to this case, and for good reason . . . . [T]he Government . . . has not placed the land beyond federal supervision. Rather the Federal Government has shown a continuing solicitude for the rights of

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In *Taylor*,[6] this Court cited the *Franchise Tax Board* interpretation of *Avco* with approval, again reaffirming that where the preemptive force of federal law is "so powerful," any suit directly relating to the completely preempted area must be recharacterized as "purely a creature of federal law." *Taylor*, ___ U.S. at ___, 107 S.Ct. at 1546-47. *Amicus* will hereinafter urge that, in the fields of tribal sovereign immunity and state civil jurisdiction, the preemptive force of federal common law is so powerful that the state's purportedly state-law suit must be "recharacterized" as "purely a creature of federal law." So doing, it will maintain that, in these fields, congressional supervision has been exercised with such selectivity and care over two centuries, that the federal interest is at *least* equal to – and, in reality, *much greater than* – its interests in the LMRA and ERISA found sufficiently powerful to effectuate state court displacement in *Avco* and *Taylor*. At a *minimum*, *amicus* suggests, the Tax Commission's "right to relief under state law requires resolution of a substantial question of federal law," *Franchise*

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> Indians in their land . . . . Thus, the Indians' right to possession in this case is based not solely on the *original* grant of rights in the land but also on the Federal Government's subsequent guarantee.

Oneida, 414 U.S. at 684 (Rehnquist, J., concurring) (emphasis in original). *Amicus* submits that the preceding rationale is equally applicable to the instant case, in that the federal government has exercised a subsequent and continuing supervision over both tribal sovereign immunity, and state civil jurisdiction over Indian country, which are the areas of law which it suggests create the "complete preemption" herein. In short, *Oneida*, a "mirror image" of this case for purposes of its "case arising" analysis, furnishes a pivotal key to the resolution of the instant dispute.

[6] *Amicus* believes that *Caterpillar* must be read *in pari materia* with *Taylor*, decided only two months before.

Tax Board, 463 U.S. at 13, sufficient to invoke complete preemption.[7]

C. The Tax Commission's Claims, Purportedly Based on State Law, are not only Preempted by Federal Law, but are Completely Displaced by it, to the Extent that the Tax Commission's State Court Claims must be Recharacterized as Necessarily Federal in Nature, Removable to Federal Court pursuant to 28 U.S.C. § 1441(b).

1. Since the field of *tribal sovereign immunity* is not only preempted by federal law, but is completely displaced by it, the Tax Commission's claims must be recharacterized as necessarily federal in nature.

The sovereign immunity issue here is not "doubtful, conjectural, [or] . . . far removed from plain necessity," *see Gully*, 299 U.S. at 117, and constitutes a "substantial cause" of the "real substance of" the litigation, *id.* at 118, 114, "and substantially involves a dispute or controversy respecting the validity, construction, or effect of such law, upon determination of which the result depends." *Id.* at 114. By itself, these factors may or may not be sufficient to warrant removal, but even pursuant to the *Avco/Taylor* "federal interest so dominant" test, that interest, pursuant to the trust responsibility, in only *selectively* abrogating tribal sovereign immunity, is "so powerful as to displace any state cause of action." *See Taylor*, ___ U.S. at ___, 107 S.Ct. at 1546.

In a general sense, of course, the primacy of federal law in the field of Indian affairs cannot be gainsaid. *See*

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[7] In order to sustain such a conclustion, this Court need not look beyond the complaint for information relating to the status of the parties, although it may, *see generally*, 14A C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure* 264-65 (2d ed. 1985) ("better rule"); 1A *Moore's Federal Practice Manual* 185-87 (2d ed. 1974), since the Chickasaw *Nation* is named in the caption as a party defendant; in short, the jurisdictional impact is apparent from the face of the complaint itself.

generally The Federalist No. 42, at 290 (J. Madison) (E. Bourne ed. 1937) (defects in Articles of Confederation approach to allocation of state and federal power regarding Indians); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (early establishment of federal supremacy); *United States v. Celestine*, 215 U.S. 278, 290 (1909) ("it is for congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress."); *Bryan v. Itasca County*, 426 U.S. 373, 376 n.2 (1976) (summary of earlier holdings); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) (reaffirming that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States."); *Mashunkashey v. Mashunkashey*, 134 P.2d 976, 979 (Okla. 1942) (Oklahoma Supreme Court recognizing federal plenary power over Indians as "[f]ull; entire; complete; absolute; perfect; unqualified"). But *amicus* does not understand Respondents' position to necessarily maintain that the *entire field* of Indian law is *completely* preempted within the meaning of *Avco* and *Taylor* although, as a general matter, both federal common law and statutes preempt state law within the meaning of *Pilot Life Ins. Co. v. Dedeaux*, ___ U.S. ___, 107 S.Ct. 1549 (1987). In short, it is unnecessary to the resolution of this case to decide that every issue touching and concerning the field of Indian law is completely preempted, since this case involves a unique attempt by a state to impose its sovereignty – and the civil jurisdiction of its courts – on an unconsenting federally recognized tribe.

Pursuant to its trust responsibility, Congress has taken the field of tribal sovereign immunity completely in hand. Perhaps especially in the context of the Five Civilized Tribes, it has demonstrated that it not only knows how to abrogate tribal sovereign immunity when it wants to, *see, e.g.*, Act of June 28, 1898, § 2, 30 Stat. 495, held to be a *limited* abrogation of tribal sovereign immunity in *Adams v. Murphy*, 165 F. 304 (8th Cir. 1908); Act of April 26, 1906, § 18, 34 Stat. 137, 144, held to be a *limited* abrogation of tribal sovereign immunity in *United States*

v. United States Fidelity & Guar. Co., 309 U.S. 506, 513 (1940); Public Law 93-195, § 2, 87 Stat. 769 (1973) (*limited* abrogation of tribal sovereign immunity), but also that, in the exercise of its trust responsibility, it would exercise that power with great selectivity and care. *See, e.g., Thebo v. Choctaw Tribe*, 66 F. 372, 373-74 (8th Cir. 1895); Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, tit. I, § 110, 88 Stat. 2213 (1975). "Congress alone must determine the extent to which the immunities and protetion afforded by tribal status are to be withdrawn." *Haile v. Saunooke*, 246 F.2d 293, 297-98 (4th Cir.), *cert. denied*, 355 U.S. 893 (1957); *see also id.*, cases cited therein; *see generally Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987) (tribes enjoy attributes of sovereignty unless divested by federal statute or treaty). The federal policies of tribal self-determination, economic development, and cultural autonomy require tribal sovereign immunity, *see, e.g., United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981); Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058 (1982), and only Congress may modify that judgment. *See generally Baker v. Carr*, 369 U.S. 186, 215-17 (1962) (political question implications of commitment of issue to coordinate political branch in context of congressional authority over Indian affairs); *Atkinson v. Haldane*, 569 P.2d 151, 161-62 (Alaska 1977) (political question doctrine applied to tribal sovereign immunity). This Court has recognized the inviolability of tribal sovereign immunity, absent abrogation, with an unwavering historical consistency. *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 890 (1986) (*Three Tribes II*) (*common law* tribal sovereign immunity necessary to tribal self-governance); *id.* at 891 (privileged from diminution by the states absent federal abrogation); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (same); *Puyallup Tribe v. Dep't of Game*, 433 U.S. 165, 172-73 (1977) ("settled" principle, applied even to tribal activities *outside* Indian country); *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 443 P.2d 421 (1968) (Arizona Supreme Court, *in banc*, unanimously anticipating *Puyallup* holding); *see also supra*

at 2 n.2 (*Chemehuevi* litigation). Sovereign immunity, this Court's caselaw has taught, is not a doctrine "the application of which is in the discretion of the court." *People v. Quechan Tribe*, 595 F.2d 1153, 1155 (9th Cir. 1979). Nor is the doctrine's application affected by the fact that the state is the party plaintiff, *id.*, or that the suit involves a tribally-owned commercial enterprise. *Maryland Casualty Co. v. Citizens Nat'l Bank*, 361 F.2d 517, 521-22 (5th Cir. 1966).

Standing against this unqualified avalanche of precedent is *Oklahoma ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985), decided three months before the instant litigation was brought in the Oklahoma state courts.[8]

In that case, the Oklahoma Supreme Court, in a decision both confusing sovereign immunity with tribal *jurisdiction*, and confusing a threshhold issue with the merits, denied tribal sovereign immunity based on an impressionistic and state-oriented balancing test. While that holding simply refused to follow this Court's categorical pronouncements in *U.S. Fidelity & Guar.*, *Santa Clara Pueblo*, and *Puyallup*, and is consequently and manifestly wrong, it does explain the Tax Commission's earnest desire to keep this case from the federal courts: if successful in its attempt to artfully plead a completely preempted cause of action, it is willing to gamble both that

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[8] *Amicus* suggests that one would need to be myopic indeed to not see this coincidence as at least circumstantial evidence of motivation for an attempt by the Tax Commission to "artfully plead" its complaint. In *Federated Dep't Stores v. Moitie*, 452 U.S. 394 (1981), Justice Rehnquist, writing for this Court, referred to the rule that "courts 'will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum'" as a "settled principle" of law. *Id.* at 397 n.2 (citation omitted); *see also Clorox Co. v. District Court*, 779 F.2d 517, 521 (9th Cir. 1985); *Nuclear Engineering Co. v. Scott*, 660 F.2d 241, 249 (7th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982); 14A C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* 266-73 (2d ed. 1985).

the Oklahoma Supreme Court will not reverse its erroneous holding in *May*, and that this Court will not grant subsequent review. *May* cannot, however, detract from the overwhelming preemptive force of federal law in the field of tribal sovereign immunity, and is, in fact, so radically wrong that further proceedings in that case were enjoined in federal court, *Younger v. Harris*, 401 U.S. 37 (1971), notwithstanding. *See* Respondents' Brief in Opposition to Petition for Certiorari, App. at 33-55.

2. Since the field of *state civil jurisdiction* over Indian activities in Indian country is not only preempted by federal law, but is completely displaced by it, the Tax Commission's claims must be recharacterized as necessarily federal in nature.

Historically, Indian activities within Indian country were generally considered beyond both the legislative and judicial jurisdiction of the states, unless Congress specifically provided otherwise. *See, e.g., Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 142 (1984) (*Three Tribes I*); *Williams v. Lee*, 358 U.S. 217, 222 (1959); United States Dep't of Interior, *Federal Indian Law* 363 (1968). In this area of tribal-state relations, no less than in the context of tribal sovereign immunity, Congress has, pursuant to its trust responsibility, exercised continuing and meticulous supervision.

Both specific and general statutes relating to criminal jurisdiction are too numerous to mention. In the civil context, relevant here, recent congressional enactments have dealt, *inter alia*, with the New York Indians, Act of Sept. 30, 1950, ch. 947, § 1, 64 Stat. 845 (codified at 25 U.S.C. § 233); terminated federal recognition of some tribes, *see Bryan v. Itasca County*, 426 U.S. 373, 389 n.15 (1976) (citing statutes); enacted § 4 of Public Law 280 (state civil jurisdiction); and required tribal consent to state assumptions of civil jurisdiction, Pub. L. 90-284, tit. IV, § 402, 82 Stat. 79 (1968). Amicus urges that these activities by Congress – to a degree at least as extensive

as its regulation of Indian lands – evidence both exhaustive supervision and a "continuing solicitude" (with narrow exceptions) for the rights of tribes and tribal members to be free from state civil jurisdiction regarding their activities in Indian country. *See supra* at 14 n.5 (citing *Oneida*, 414 U.S. at 682) (Rehnquist, J., concurring).

The Tax Commission misapprehends the total focus of Public Law 280, citing out of context, *see* Brief of Petitioner at 32, *Cabazon Band's* observation that Congress' primary concern in enacting that law was in its criminal jurisdictional aspects. It neglected to note this Court's immediately preceding sentences, see 480 U.S. at 207-08, which, citing to *Bryan*, 426 U.S. at 385,[9] noted the limited and specific nature of § 4 of that Act, which related to the *civil* jurisdiction question relevant herein. Public Law 280 was the result of "comprehensive and detailed congressional scrutiny," *Kennerly v. District Court*, 400 U.S. 423, 424 n.1, 427 (1971), *"and was intended to replace the ad hoc regulation of state jurisdiction over Indian Country with general legislation . . . ."* *Three Tribes II*, 476 U.S. at 884. Public Law 280 was, of course, given preemptive effect in *Kennerly*, 400 U.S. at 426-27, where this Court held that the methodology therein provided for acquiring state civil jurisdiction over Indian activities in Indian country was exclusive. The 1968 amendments to Public Law 280 are equally preemptive, since Congress was there "motivated by a desire to shield the Indians from unwanted extensions of jurisdiction over them . . . ." *Three Tribes II*, 476 U.S. at 886. The overwhelming dominance of the federal interest in this area, too, is now "well settled."

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[9] *Bryan* also took note of the termination Acts, which it characterized as "cogent proof that Congress knew how to express its intent directly. . . ." *Bryan*, 426 U.S. at 389. Its observation concerning the preemptive effect of those Acts is equally apposite here.

3. It is not necessary that the federal cause of action necessarily relied upon by the plaintiff provide plaintiff with a remedy in order for a case to be removable to federal court pursuant to the "complete preemption" doctrine.

Early on, courts dealing with the privileges and immunities of federally recognized tribes noted that the absence of otherwise-available remedies was a legal fact of federal Indian law, necessary to the preservation of tribal sovereignty and, as regulated by Congress, to the effectuation of the federal trust responsibility. *See, e.g., Adams v. Murphy*, 165 F. 304, 309 (8th Cir. 1908) (absence of a "plain, speedy, or adequate remedy" denied by "considerations of sound public policy"). Modern case-law has, wholly apart from the context of Indian law, supported the proposition that the absence of ability to prevail on a federal remedy in federal court is not a bar to a finding of "complete preemption."

In *Avco*, 390 U.S. 557, this Court noted that "the breadth or narrowness of the relief which may be granted under federal law in § 301 cases *is a distinct question* from whether the court has jurisdiction over the parties and the subject matter. *Id.* at 561 (emphasis added). In *Caterpillar*, ___ U.S. ___, 107 S.Ct. 2425 (1987), it stated that "[t]he Court of Appeals also appears to have held that a case may not be removed to federal court on the ground that it is completely preempted unless the federal cause of action relied upon provides the plaintiff with a remedy. . . . This decision is squarely contradicted by our decision in *Avco*." *Id.* at 2429 n.4. *Amicus* suggests that this issue, too, is now "well settled."

D. Alternatively, Since Tribal Sovereign Immunity is Jurisdictional, and since Judgments Absent Subject Matter Jurisdiction are Void Even Absent Appearance by Defendant, Tribal Sovereign Immunity Cannot Properly be Characterized as a Defense.

In *Ramey Construction Co. v. Apache Tribe*, 673 F.2d 315 (10th Cir. 1982), the Tenth Circuit stated that "sovereign

immunity must stand unless it *affirmatively appears* that there has been a congressional or tribal waiver of immunity." *Id.* at 318; *see also U.S. Fidelity & Guar.*, 309 U.S. at 514. This conclusion is correct for several reasons. Tribal sovereign immunity is jurisdictional. *Id; see also Quechan Tribe*, 595 F.2d at 1154 & n.1. Since this Court has held that any judgment against a tribal sovereign possessing immunity is "void in the absence of congressional authorization," *Puyallup*, 433 U.S. at 172 n.10, and since the burden of pleading follows the burden of proof, tribal sovereign immunity cannot properly be characterized as a defense. The Tax Commission's complaint, which alleged no right to sue a sovereign, was consequently not a "well pleaded" one, since, in the unique context of a suit by a state against a federally recognized tribe regarding its activities in Indian country, and in a non-Public Law 280 state, a state district court essentially sits as a court of *limited*, not general original jurisdiction. Clearly, Oklahoma could not grant civil jurisdiction to itself in the instant case.

II. THE TENTH CIRCUIT DECISION BELOW CORRECTLY AFFIRMED DISMISSAL OF THE STATE'S STATE COURT COMPLAINT AGAINST THE FEDERALLY RECOGNIZED CHICKASAW NATION.

A. The Tax Commission's Assertion that Tribal Sovereignty has been Abolished in Oklahoma, and that State Law Applies, part and parcel, to All Indian Country Therein, is at Variance with Congressionally and Presidentally-declared Policy, Every Federal Decision which has Addressed the Issue, and with Current Decisions of both the Oklahoma Supreme Court and the Oklahoma Court of Appeals.

Respondent Tax Commission has devoted eighty percent of the substance of its Brief-in-Chief to attempting to establish that all tribal sovereignty has been disestablished in Oklahoma, that "reservations" continue to be defined as they were one hundred years ago, and that state law applies, presumably part and parcel, to all Indian country in the state. Brief of Petitioner at 12-39. In so doing – and, as is otherwise apparent from the hostile

tone of its Brief-in-Chief in general, *see supra* at 2-3 – it recalls to mind the "deadliest enemies" allusion of this Court in *United States v. Kagama*, 118 U.S. 375, 384 (1886).[10] In maintaining its remarkable position, the Tax Commission seeks from this Court what it has been unable to secure from Congress: *de facto* tribal termination, and relegation of their status to that of "private, voluntary organizations." See *United States v. Mazurie*, 419 U.S. 544, 557 (1975). But tribal sovereignty has not been extinguished by Congress, and "reservations," for jurisdictional purposes, are now defined by reference to the "Indian country" approach of 18 U.S.C. § 1151.

The evolution of "reservation" analysis in this Court was reflected early in this century in *United States v. Pelican*, 232 U.S. 442 (1914). In that case, it articulated a standard focusing on whether land "had been validly set apart for the use of the Indians as such, under the superintendance of the Government." *Id.* at 449. The jurisdictional implications of the modern "reservation" approach had been recognized even earlier. *See United States v. Celestine*, 215 U.S. 278, 285 (1909). In *United States v. McGowan*, 302 U.S. 535 (1938), this Court held that the "Reno Indian Colony," consisting of 28.38 acres, which had been *purchased with federal funds*, was, despite both

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[10] *Amicus* hastens to add that this posture, even within Oklahoma, is apparently and hopefully *sui generis* to the Tax Commission, since the Governor of Oklahoma has recently promulgated a statement calling for increased tribal/state cooperation, the Oklahoma Legislature in its latest session passed three statutes to the same effect, *see, e.g.*, Okla. Stat. Ann. tit. 74, §1221 (West Supp. 1989) (Oklahoma recognizing "unique status" of federally-recognized tribes); Okla. Stat. Ann. tit. 74, §1222 (West Supp. 1989) (tribal government/state government relations), and both the Oklahoma Supreme Court (while manifestly misguided in its approach to tribal sovereign immunity, *see supra* at 19-20) and the Oklahoma Court of Criminal Appeals have acknowledged the presence of jurisdictionally-congnizable Indian country in the state.

that fact and its designation as a "colony," a "reservation" for jurisdictional purposes.

In 1948, Congress enacted 18 U.S.C. § 1151. While its "Indian country" definition is facially limited to the criminal jurisdictional context, this Court has long held "that it generally applies as well to questions of civil jurisdiction." *De Coteau*, 420 U.S. at 427 n.2 (citing cases). In 1978, this Court, citing *Celestine*, *Pelican*, and *McGowan*, applied § 1151 as the jurisdictional touchstone in modern Indian law. *United States v. John*, 437 U.S. 634, 648-49 (1978). This approach has persisted to the present date. *Cabazon Band*, 480 U.S. at 207 n.5.

"Only Congress can divest a reservation of its land and diminish its boundaries." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Respondent Choctaw Nation – and the other Civilized Tribes – have treaty rights and guarantees which remain the supreme law of the land, *see Missouri v. Holland*, 252 U.S. 416 (1920), unless repudiated by subsequent congressional action, *see The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1871), and "[d]iminishment . . . will not lightly be inferred." *Solem*, 465 U.S. at 470. In short, treaty rights still obtain absent Congressional repudiation, and the Tax Commission's record in this case for establishing the absence of a single parcel of jurisdictionally cognizable "Indian country" in Oklahoma is as inadequate as can be imagined. At a *minimum*, the Chickasaw Nation enjoys a "diminished" "reservation" for jurisdictional purposes herein.

Ignoring *Ex Parte Webb*, 225 U.S. 663, 682-83 (1912) (§ 1 of Oklahoma Enabling Act negates any Congressional purpose to repeal by implication existing federal laws), and *United States v. Ramsey*, 271 U.S. 467 (1926) (continued existence of, and federal authority over, "Indian country" in Oklahoma), the Tax Commission mis-cites to *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943), omitting the last clauses of an important sentence, *and* a critical footnote placed thereafter. *Compare* Brief of Petitioner at 11-12 *with Oklahoma Tax Comm'n*, 319 U.S. at 603 & n.5. In that footnote, this Court took cognizance of the potential effect of the Oklahoma Indian Welfare Act, 49

Stat. 1967 (1936) (codified in 25 U.S.C. §§ 501-509), passed only seven years before, on the further pursuit of assimilationist policies in Oklahoma. As this Court noted in *Bryan*, 426 U.S. at 389 n.14 [citing *Santa Rosa Band v. Kings County*, 532 F.2d 655, 663 (9th Cir. 1975)], "courts 'are not obliged in ambiguous instances to strain to implement [an] assimilationist policy Congress has now rejected, particularly where to do so will interfere with the present congressional[11] approach to what is, after all, an ongoing relationship.' " Moreover, the footnote in *Oklahoma Tax Comm'n*, 319 U.S. at 603 n.5, further cites to F. Cohen, *Handbook of Federal Indian Law* (1942), which indicates the criteria for continued tribal cohesion, *id.* at 131 and, in Cohen's final section, takes note of the provisions of the Oklahoma Indian Welfare Act. *Id.* at 455. The correlation between the two is apparent. Moreover, *Oklahoma Tax Comm'n* must be read *in pari materia* with *Board of Comm'rs v. Seber*, 318 U.S. 705 (1943), decided less than two months before, which presents a picture of Oklahoma Indian sovereignty substantially at variance with that offered by the Tax Commission. *Id.* at 718. Finally, it is interesting to note that *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 165 n.1 (1973), cites *Oklahoma Tax Comm'n* as a "reservation Indians" case.

Nor may Oklahoma be "singled out" from other non-Public Law 280 states on other grounds. § 1151 "resolved existing doubts in favor of federal jurisdiction, and its general thrust is to establish a uniform rule." F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) 779 n.86. The governments of the Five Civilized Tribes were specifically continued by Congress in 1906. Act of April 26, 1906, 34

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[11] *Amicus* notes that the current federal policy promoting tribal sovereigny and opposing assimilationist policy is not limited to the legislative branch. *See* Statement of President Reagan on Indian Policy, 19 Weekly Comp. Pres. Doc. (Jan. 24, 1983) 96, 99; Message of President Nixon to the Senate Relating to the American Indians, 116 Cong. Rec. S23,258 (July 8, 1970).

Stat. 137; *see also Morris v. Watt*, 640 F.2d 404 (D.C. Cir. 1981); *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978). That Indian country exists in Oklahoma is evidenced, in addition to this Court's decisions adduced above, by *Indian Country, U.S.A. v. Oklahoma Tax Comm'n*, 829 F.2d 967 (10th Cir. 1987), *cert. denied sub nom. Oklahoma Tax Comm'n v. Muscogee (Creek) Nation*, ___ U.S. ___, 108 S. Ct. 2870 (1988); *Cheyenne-Arapaho Tribes v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980); *State v. Burnett*, 671 P.2d 1165 (Okla. Crim. 1983); and *Ahboah v. Housing Auth.*, 660 P.2d 625 (Okla. 1983); *see generally May*, 711 P.2d at 81 [withdrawing in part *Ex parte Nowabbi*, 60 Okla. Crim. 111, 61 P.2d 1139 (1936)]. The existence of Indian country does not depend on the manner in which the land at issue was acquired, *see, e.g., State v. Youngbear*, 229 N.W. 2d 728, 732 (Iowa), *cert. denied* 423 U.S. 1018 (1975) (citing *McGowan*, 302 U.S. 535), nor is the size of the "reservation" relevant to its "Indian country" status. *Langley v. Ryder*, 778 F.2d 1092 (5th Cir. 1985). The Tax Commission's out-of-context citation to *Oklahoma Tax Comm'n* is unavailing, as is its reference to the "legislative history" of the Oklahoma Indian Welfare Act, *see* Brief of Petitioner at 25, which, it turns out, is a 1935 Senate report on a bill which was later substantially amended prior to enactment, the earlier version having been found to contain a number of "objectionable provisions." *See* H.R. Rep. No. 2408, 74th Cong., 2d Sess. (1936) at 3. The latter report, it may be noted, concluded that the "sovereignty" provisions of the Act "permit the Indians of Oklahoma to exercise substantially the same rights and privileges as those granted to Indians outside of Oklahoma by the Indian Reorganization Act. . . ." *Id.* Recent congressional policy is in accord with the above conclusions. *See, e.g.*, Indian Gaming Regulatory Act, §§ 2(4), 4(4)(B), 20 (a)(2)(A), ___ Stat. ___, 134 Cong. Rec. S12,657 (daily ed. Sept. 15, 1988).

B. The Tax Commission's Equally Stunning Assertion that "Insofar as § 1151 operates to directly displace the State's ability to administer its tax laws evenly upon all citizens, it is not within the authority granted Congress by the Commerce Clause" is Without Merit.

The Tax Commission's invocation of *National League of Cities v. Usery*, 426 U.S. 833 (1976), Brief of Petitioner at 31, is unavailing. Whether or not this Court should choose to breathe new life into *Usery*, *see, e.g., South Carolina v. Baker*, ___ U.S. _ _, 108 S. Ct. 1355 (1988), the plenary nature of federal power over Indian tribes has been recognized from the beginning. *See* The Federalist No. 42, at 290 (J. Madison) (E. Bourne ed. 1937); *see also supra* at 16-17. In any case, this issue may not even properly be before this Court. *See* 28 U.S.C. § 2403; Sup. Ct. R. 28.4(b).

C. The Law in Effect prior to June 19, 1986 Mandated Dismissal of Removed Actions where the State court Lacked Jurisdiction over the Claim.

"If the state court lacks jurisdiction over the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction." *Lambert Run Coal Co. v. Baltimore & Ohio R.R.*, 258 U.S. 377, 382 (1922). The 1986 amendment to 28 U.S.C. § 1441, in which § 1441(e) was added, Pub. L. 94-583, § 6, 90 Stat. 2898 (1986), occurred after filing and removal in the instant case. J.A. 1, 2.

D. Oklahoma Courts Lack Jurisdiction over an Action Against a Federally Recognized Indian Tribe Regarding its Activities Within Indian Country.

Oklahoma courts lack subject matter jurisdiction over the instant controversy for the reasons adduced *supra* at 20-21. In addition, they likely lack *in personam* jurisdiction as well. *See, e.g., Francisco v. State*, 113 Ariz. 427, 556 P.2d

1, 4 (1976); F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) 349-50.

CONCLUSION

That the standard for determining the extent of the federal courts' "case arising" jurisdiction is a multi-dimensional one is now, indeed, "well settled." Well settled, too, is the overwhelming nature of the federal interest in regulating – unencumbered by inconsistant state court adjudications – both the sovereign immunity of the federally recognized tribes, and the extent of state civil jurisdiction in Indian country.

Concerning the existence of tribal sovereignty and Indian country in Oklahoma, the Tax Commission's analysis is manifestly misguided. Its assertion that allotment was a federal *duty* given *tribal* breaches of *their* trust responsibility, Brief of Petitioner at 16, is, to say the least, a novel interpretation of that trust responsibility, *see, e.g., Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) ("guardian-ward" relationship), and, to say a bit more, a "cruel joke." *See, e.g., United States v. John*, 437 U.S. at 653. Even the Tax Commission concedes that

> [a]lthough white settlement was illegal, the federal government did nothing to stop it. . . .Also, white settlers were not happy with their inability to exercise political control over the Territory to mold the environment to their liking. As the white population continually grew, so did the demand to abolish the reservations so that land could pass freely into white hands. . . .

Brief of Petitioner at 14; *see also id.* at 23 ("federal government made no effort to enforce the agreements on its part . . . "); *see generally* J. Malone, *The Chickasaw Nation* 438-446 (1922) (circumstances surrounding allotment involving fraud and corruption); A. Debo, *And Still the Waters Run: The Betrayal of the Five Civilized Tribes passim* (1972) (same). Far from being an exercise in "statesmanship," Brief of Petitioner at 38, the Dawes Commission's activities resulted in an "orgy of plunder and exploitation probably unparalleled in American history." *Id.* at 91; *see*

also Harjo, 420 F. Supp. at 1121, 1130-36 (circumstances surrounding allotment in Oklahoma); *see generally United States v. Sioux Nation*, 448 U.S. 371, 376-78 (1980) (familiar forces at work regarding Sioux Nation); *John*, 437 U.S. at 643 n.11 (earlier frauds against Choctaws). Unless the tribes' treaty guarantees concerning their sovereignty and lands have been specifically negated by Congress, taking into consideration, of course, the "canons of construction", *see, e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980), such guarantees persist. In any case, residual doubts concerning the status of the land in question here have now been laid to rest by this court's interpretations of 18 U.S.C. § 1151.

Ordinarily, of course, it cannot be presumed "that state courts will not follow both the letter and the spirit of [this court's] decisions in the future." *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832, 846 (1982). In the instant case, however, no such presumption need be invoked, since *May*, 711 P.2d. at 84, speaks for itself. *See generally Georgia v. Rachel*, 384 U.S. 780, 803-04 (1966) (analogy to civil rights removal, where denial of a federally guaranteed immunity from prosecution, also analogous here, would "certainly" not be enforced). In short, it is the Tax Commission's perennial[12] insistence on judicial abrogation of Oklahoma tribal sovereignty, not that tribal sovereignty itself, which should be "extinguished" by this Court in the instant case.

Respectfully submitted,

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[12] *See, e.g., Indian Country, U.S.A.*, 829 F.2d at 975 n.3.